IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 900

NELLO L. TEER COMPANY, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Claims

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REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

The brief of the United States in opposition to the petition for a writ of certiorari raises several points which require a reply.

The Government contends (Opp., p. 17, fn. 8)[1] that

[1] "Opp." references herein refer to Brief for the United States in Opposition.

an Armed Services Procurement Regulation, adopted in 1965, will prevent future occurrences of the situation which aggrieved the petitioner in this case. This recently adopted regulation will not accomplish such a purpose for two main reasons. First, the regulation applies only to the contracts entered into by the agencies of the Department of Defense. The same perils continue to exist in all of the contracts for federally financed or assisted projects entered into under the various statutory authorities cited at page 18 of the petition. This recent change in the procurement regulation also does not apply to the vast number of contracts of the General Services Administration, Department of the Interior, Veterans Administration, Federal Aviation Agency, National Aeronautics and Space Administration, Atomic Energy Commission, and the many other contracting agencies of the government which are not a part of the Department of Defense.

Secondly, the cited amendment to the Armed Services Regulation by its terms excludes from the scope of the Disputes clause only questions concerning the meaning and interpretation of classifications *contained* in the wage decision. It would have no application where, as here, the dispute concerns classifications and wages of workers which are *not* contained in the wage determination. (Opp., pp. 3-4)

The Government also considers as pertinent (Opp., p. 2) a regulation promulgated by the Secretary of Labor in 1964 (29 F.R. 8004) relating to practice before the Wage Appeals Board. It urges that adoption of that regulation (Opp., p. 16) tends to moot any question of the lack of administrative due process. To the contrary, this provision for review of classifi-

cation controversies by the Department of Labor board furnishes no guarantee that contractors will be afforded a right to be heard or present evidence, nor does it safeguard the contractor against arbitrary, capricious, grossly erroneous, or *ex parte* decisions. That regulation makes the granting of any review a matter of discretion, not of right, and carefully limits the decisions which may be reviewed to those which "involve significant sums of money, large groups of employees, or novel or unusual situations." The stated review criteria make clear that the Board is not intended to afford contractors any right to obtain a review of the classification questions which routinely arise in the course of the performance of any construction contract. Inasmuch as the regulations fail to provide a guarantee of administrative due process in any controversy, they are an ineffectual substitute for proceedings under the standard Disputes provisions of construction contracts.

In its statement of facts (Opp., p. 8) the Government blandly characterizes as a "gamble" petitioner's determination that power equipment operators had been omitted from the published specification. Yet counsel for the Government concede that the omission of the highway classification for power equipment operators was an error (Opp., p. 7, fn. 3). They shrug aside this vital concession with the remarkable statement that had petitioner's claim been presented it "could in all likelihood have been settled administratively." What they choose to ignore is that petitioner took the only action possible to assert this claim administratively, in that it prepared and submitted the requisite request for the approval of wage rates for this omitted classification (88a) in accordance with Paragraph SC 17 (b) of the contract (4a).

It was not any nonfeasance of the contractor, but rather the erroneous refusal of the contracting officer to approve the lower scale of wages for the power equipment operators—even though it conformed with the lower scale being paid to the other heavy and highway construction workers on the project—which gave rise to this action. The contracting officer, not the Secretary of Labor, is obligated under the contract to make sure that the wages paid by the contractor are in conformity with the listed rates. Such contractual authority is a necessary corollary to the statutory authority (invested in the contracting officer by Section 276a-1 of the Davis-Bacon Act) to terminate a contract in the event that he finds that the rate of wages required by the contract are not being paid. Since unquestionably this duty of enforcement is exclusively that of the contracting officer, it cannot be usurped by the Secretary of Labor.

Respectfully submitted,

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